STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 9, 2007
V	No. 262912 Livingston Circuit Court
CEDRIC E. BAIZ Defendant-Appellant.	04-014504

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his sentence of 18 month to 15 years' imprisonment following a jury trial conviction for second-degree criminal sexual conduct, MCL 750.520c(1)(a). We affirm the trial court's scoring of OV 10 but, because the trial court failed to make an independent determination that defendant's testimony amounted to willful, material, and flagrant perjury, we remand this case for an articulation of the reasons supporting the scoring of OV 19.

Defendant's charge stems from an incident wherein he allegedly touched the breasts of his stepdaughter's twelve-year-old friend. While the victim testified at trial as to the details of the incident, defendant's stepdaughter and defendant both testified that the incident never occurred. The jury nevertheless found defendant guilty as charged.

On appeal, defendant challenges the scoring of offense variables (OV) 10 for his offense under the sentencing guidelines. We find that this OV was correctly scored.

A sentencing court's scoring of points under the sentencing guidelines is reviewed for an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). As long as there is some evidence of record in support, a scoring decision will be upheld. *Id*. The trial court's factual findings at sentencing are reviewed for clear error. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

Offense variable 10 concerns exploitation of a vulnerable victim. MCL 777.40. Defendant was assessed 15 points for OV 10 because predatory conduct was involved. Predatory conduct for purposes of this variable is defined as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 770.40(3)(a).

In this case, evidence was presented at trial that defendant approached the victim and his stepdaughter early in the morning and began rubbing their legs and asking them to smoke marijuana with him. The victim testified that defendant then yelled at his stepdaughter to take a shower, thus securing time alone with the victim. When alone with the victim, defendant initiated conversation of a sexual nature with her, complimented her physical attributes, and touched her. This evidence permits an inference that defendant was attempting to secure privacy with the victim and to create an atmosphere that would relax her and lessen her inhibitions. *People v Witherspoon*, 257 Mich App 329, 336; 670 NW2d 434 (2003). Viewing the evidence in its totality, defendant engaged in "preoffense conduct directed at a victim for the primary purpose of victimization. MCL 777.40(3)(a). Thus, the trial court did not err in finding that defendant engaged in predatory conduct, and did not abuse its discretion in approving a score of 15 points on OV 10.

Defendant next asserts that OV 19 was incorrectly scored.[1] OV 19 provides that 10 points shall be scored if the defendant "interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). In *People v Barbee*, 470 Mich 283, 286-287; 681 NW2d 348 (2004), our Supreme Court rejected the notion that the language "interfered with or attempted to interfere with the administration of justice" was equivalent to the term of art "obstruction of justice." The Court determined that an act need not "necessarily rise to the level of a chargeable offense" to constitute an interference with the administration of justice. *Id.* at 287.

Here, defendant does not challenge the trial court's conclusion that perjury constituted an attempt to interfere with the administration of justice. In fact, there is no question that perjury provides a basis for scoring OV 19, as a willful assertion of facts, opinions, or beliefs known by a testifying witness to, in fact, be false, interferes with the administration of justice. See *People v Jenkins*, 244 Mich App 1, 15 n 6; 624 NW2d 457 (2000). Instead, defendant asserts as error the trial court's assessment of points on OV 19 based upon its conclusion that because defendant testified that the incident never occurred and the jury nevertheless found him guilty of the offense charged, he must have committed perjury.

The jury in this case was presented with two differing versions of the event that led to defendant's arrest. By finding defendant guilty, the jury presumably found the testimony of the victim to be more credible than that of defendant and his stepdaughter. This does not necessarily equate, though, with a finding that defendant did, in fact, lie, when he testified at trial. We have no way of knowing the jury's thought process or reasoning behind finding defendant guilty, and that the jury chose to believe one version does not necessarily make that version the truth—it simply makes that version more believable. Moreover, the assessment of ten points under OV 19 for perjury based upon the mere fact that a defendant testified as to his innocence, but was ultimately found guilty, raises constitutional concerns.

[1] Although defendant also challenged the scoring of OV 12 at his sentencing, he has not alleged error regarding the scoring of this offense variable on appeal.

Most importantly, the trial judge here made no specific finding regarding what portions of defendant's testimony it considered perjured. Due process requires that a defendant's sentence be based on accurate information and that the defendant have a reasonable opportunity at sentencing to challenge that information. *People v Miles*, 454 Mich 90, 100; 559 NW2d 299 (1997). When a trial court simply bases a sentencing enhancement on the fact that the defendant has testified to his innocence, but the jury has found him guilty, the sentence may not be based on accurate information. Requiring the sentencing court to make specific findings concerning how the defendant has perjured himself would ensure that the sentence is based on findings that the defendant has the opportunity to challenge at sentencing. This conclusion is supported by *People v Adams*, 430 Mich 679, 693; 425 NW2d 437 (1988), in which our Supreme Court indicated that the trial court itself must have concluded that the defendant's alleged perjury was willful, material, and flagrant. See also *People v Marchese*, 608 NYS2d 776, 781-782; 160 Misc 2d 212 (1994) (concluding due process is ensured by requirements that a sentencing enhancement based on perjury is permitted only when the perjury was committed in the presence of the sentencing judge, the perjury concerned basic adjudicative facts,[2] the evidence of perjury was material to the issues in the case, and the perjured testimony was only one factor considered in light of the goals of sentencing).

In this case, the trial court failed to make a finding that defendant perjured himself or that any perjury was willful, material, and flagrant. Rather, the trial court stated that it was the jury who made the finding that defendant had perjured himself. Consistent with *Adams, supra*, this case must be remanded to the sentencing court "to permit the sentencing judge to supply his reasoning." *People v Triplett*, 432 Mich 568, 573; 442 NW2d 622 (1989).[3]

Affirmed in part, remanded in part. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald

[2] *Marchese* cited *People v Longuemire*, 87 Mich App 395, 398; 275 NW2d 12 (1978) to demonstrate the difference between adjudicative facts and issues of ultimate fact. *Marchese*, *supra*, 608 NYS2d 782-783.

[3] Based upon our determination, defendant's argument concerning proportionality need not be addressed at this time.